
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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EDITORS:

Arleen Huggins, ahuggins@kmlaw.ca
Phone: (416) 595-2115

David Rosenfeld, drosenfeld@kmlaw.ca
Phone: (416) 595-2700
This Edition's Editor

Nancy Shapiro, nshapiro@kmlaw.ca
Phone: (416) 595-2108

Ernie Schirru, eschirru@kmlaw.ca
Phone: (416) 595-2142

Mandatory Retirement is Retired Federally

In the spring of 2009 the Federal Court of Appeal issued a surprising decision in *Vilven v. Air Canada* which may have a significant impact on federal mandatory retirement policies and practices.

In *Vilven*, the Federal Court of Appeal upheld a Canadian Human Rights Tribunal finding that section 15(1)(c) of the *Canadian Human Rights Act*, which permits employers to terminate employees "because that individual has reached a normal age of retirement for employees working in positions similar to the position of that individual", was in violation of the *Charter of Rights and Freedoms*.

For George Vilven and his fellow Air Canada pilots who were being forced to retire at the age of 60, the Federal Court of Appeal's decision was a very welcome decision, but the battle was still not over. In reaching its conclusions, the Federal Court of Appeal referred the matter back to the Tribunal to determine whether the violation of the *Charter* could be justified in a democratic society under section 1 of the *Charter*. The Tribunal heard argument on this particular issue and in short order released a follow-up decision finding that section 15(1)(c) of the *Canadian Human Rights Act* could not be justified in the current democratic society.

The Federal Court of Appeal's decision and the subsequent Tribunal decision in *Vilven* are a clear departure from the Supreme Court of Canada's mandatory retirement trilogy decisions from the early 1990's. The Federal Court of Appeal and Tribunal's apparent disregard of the trilogy and shift in view towards mandatory retirement however is not terribly surprising. Most, if not all, of the provinces came to this realization some time ago. It is only surprising that it took the Federal government this long to fall in line with its provincial counterpart human rights legislation. Assuming these decisions stand, which they likely will, Canada's federally regulated workforce will be able to enjoy the same right as any provincially regulated workforce; the right to work well into their sixties. Lucky them.

Vilven v. Air Canada [2009] FC 367 (CanLII) and *Vilven v. Air Canada* [2009] CHRT 24 (CanLII)

Are Wallace damages for bad faith discharge still alive in Ontario?

A practical understanding of the Supreme Court of Canada's decision in *Honda Canada Inc. v. Keays* suggests that it changed or overruled its own previous case law in *Wallace v United Grain Growers Ltd.*, which effectively held that a Court could increase the notice period for a terminated employee if there was bad faith involved in the manner of termination (see Employment News – Winter 2009). This doctrine had come to be known as "Wallace damages". *Keays* held that *Wallace* damages were no longer recoverable without evidence that the manner of discharge caused some extraordinary damage that was independently provable. Since the *Keays* decision, it has generally been believed that damages for the bad faith manner in which an employee is terminated are strictly limited. However, a recent decision by the Ontario Court of Appeal in *Slepenkova v Ivanov*, suggests that *Wallace* damages for bad faith terminations may still be alive and well in Ontario.

In *Slepenkova*, a real estate agent executed three consecutive twelve-month employment contracts, each providing that her employment could be terminated with two weeks' notice. The third and last twelve month contract was "extended" by the parties. During that time, the employer unilaterally attempted to detrimentally revise the employment contract by excluding bonus payments, which were included in previous contracts. When *Slepenkova* refused to sign the new agreement, her employer terminated her employment by giving her two weeks' notice on a without cause basis. When the employee was terminated, the employer also emailed its other agent employees advising that *Slepenkova's* employment was terminated "for non-production and refusal to accept the new contract terms."

At trial, the trial judge found that the employer's email to the other agents after her termination was unfounded and damaging to her reputation. As a result, *Slepenkova* was awarded two additional months' notice as *Wallace* damages. The trial judge's award of *Wallace* damages was made prior to the Supreme Court of Canada's decision in *Keays*.

On appeal, the Ontario Court of Appeal, even with the benefit of the decision in *Keays*, upheld the trial judge's decision in awarding *Wallace* damages to *Slepenkova* as the Court of Appeal found that the trial judge's finding of fact that the employer's email was damaging to her reputation supported such an award.

Some suggest that the Court of Appeal's decision in *Slepenkova* effectively ignored the *Keays* decision. Others account for the apparent inconsistency as a natural clearing out of the remaining trial decisions that were decided prior to *Keays*. Still others suggest that *Slepenkova* is in fact consistent with the reasoning in *Keays*, as the trial judge essentially found that the employer libelled its employee, which is an independent cause of action, and that the trial judge merely expressed the damages for such libel in terms of the extra two months notice. The *Keays* decision has yet to be fully incorporated into practice. The *Slepenkova* decision suggests that *Wallace* damages may still be alive subject to the limits imposed by the Supreme Court of Canada in *Keays*. Only time will tell how strictly *Keays* will be interpreted and applied.

Slepenkova v Ivanov, [2007] O.J. No. 4708, upheld on appeal [2009] O.J. No. 2680.

Requirement to return to work as mitigation upheld again

The Court has held that a dentist acted appropriately when he offered his receptionist the opportunity to return to work after improperly laying her off. The failure by the receptionist to return to work was held to be a complete failure to mitigate her damages.

Following the 2008 decision of the Supreme Court of Canada in *Evans v. Teamsters Local Union No. 31* (see *Employment News – Summer 2008*), a number of cases relating to employers inviting employees to return to work, and the potential consequences of the employee's failure to do so. The obligation of an employee to return to work after being improperly placed on temporary layoff was addressed recently by the British Columbia Court.

The employer, a dentist, was experiencing a downturn in business and had placed his receptionist, a non-unionized employee, on temporary lay-off under the mistaken belief that he could rely upon the lay-off provisions of the provincial employment standards legislation. The employee alleged that her employment contract did not contain the right of lay-off, and as such, the employer's action amounted to a repudiation or fundamental breach of the terms of her employment, amounting to a constructive dismissal. After receipt of the initial demand letter from the employee's lawyer, the employer offered to have the employee return to work immediately.

The Court found that the employer had acted in good faith and on the belief, reasonably held, that he was permitted to utilize the lay-off provisions of the legislation. Further, the Court held that there was no question that the imposition of a temporary lay-off, in the absence of a contractual provision permitting such layoff, constitutes a fundamental breach of contract or a repudiation of the employment contract and, hence, amounts to a constructive dismissal. However, the Court held that the employee had failed to mitigate her damages by failing to accept the offer to return to work.

In reaching this conclusion, the Court indicated that the obligation to mitigate by returning to work was influenced by the fact that the lay-off was financially motivated and in good faith, and that the employer acknowledged his error and had remained courteous and respectful in communicating with the employee. It held that viewed objectively, there was "no good reason why a reasonable person in [the employee's] specific circumstances would have experienced a loss of dignity, or have valid concerns for the workplace atmosphere on a return to her previous employment". Damages were therefore limited to loss of income between the date of lay-off and the offer to return to work.

Besse v. Dr. A.S. Machner Inc. [2009] BCSC 1316 (CanLII).

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